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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 CEDAR PETROCHEMICALS, INC.

4 Plaintiff,

5 v.

06 CV 3972 (AJN)

6 DONGBU HANNONG CHEMICAL CO.,
7 LTD.,

8 Defendant.

9 New York, N.Y.
10 October 3, 2013
10:45 a.m.

11 Before:

12 HON. ALISON J. NATHAN

13 District Judge

14 APPEARANCES

15 KENNEDY, LILLIS, SCHMIDT & ENGLISH
Attorneys for Plaintiff Cedard Petrochemicals, Inc.

16 JOHN T. LILLIS
17 THOMAS FEDELI
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Attorneys for Defendant Dongbu Hannong CHemical Co. Ltd.
19 ROBERT A. WEINER
20 MICHAEL R. HUTTENLOCHER

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1 (In open court)

2 THE COURT: Please be seated. We are here for
3 summations. We have allocated somewhere between 45 minutes and
4 an hour a side. We didn't talk about order or rebuttal.

5 Mr. Lillis, you will go first or you're going to
6 switch?

7 MR. LILLIS: Yes. I have the burden of proof; I go
8 last, your Honor.

9 THE COURT: Well, that should be rebuttal. So, you
10 could either go first and be rebuttal or you can go last.

11 MR. LILLIS: I'll go last.

12 THE COURT: That's fine with me.

13 Mr. Weiner?

14 MR. WEINER: If you want us to go first, we're happy
15 to go first, but Mr. Huttenlocher is going to start our
16 argument.

17 THE COURT: And you don't want to do it on rebuttal?

18 MR. WEINER: Maybe I misunderstood, your Honor. I
19 thought you were talking about order of argument.

20 THE COURT: So, either the plaintiff will go first and
21 then the defendant with opportunity for rebuttal by the
22 plaintiff or it will simply be defendant and the plaintiff.

23 MR. WEINER: I actually have no preference. I will
24 leave this to Mr. Lillis, whatever you would like.

25 MR. LILLIS: I would prefer to close, your Honor.

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1 THE COURT: That doesn't answer the question.

2 MR. LILLIS: I'm sorry, Judge. I'm trying to answer
3 the question.

4 THE COURT: You will get the last word. The question
5 is whether you get the last word as rebuttal or simply
6 following --

7 MR. LILLIS: I would just prefer to follow Mr. Weiner.

8 MR. WEINER: That means we're up first.

9 THE COURT: Well, I'm thinking what I think would be
10 most useful. I actually do think hearing from the defendant
11 first would be most useful.

12 So, as you wish, Mr. Lillis.

13 Mr. Weiner, you will go first.

14 MR. WEINER: As I said yesterday, your Honor, we were
15 splitting our argument with the acquiescence of Mr. Lillis.
16 Mr. Huttenlocher will start. He's going to argue two issues.
17 One is the CISG and damages, and I will argue the actual
18 elements regarding the expert testimony.

19 THE COURT: Thank you.

20 Mr. Huttenlocher.

21 MR. HUTTENLOCHER: Thank you, your Honor.

22 As you know, my name is Mike Huttenlocher. I'm here
23 with Mr. Robert Weiner. We represent Dongbu Chemical.

24 Just to start, I want to thank the Court for its time
25 and attention during the proceedings this week. My partner,

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1 Mr. Weiner, and I have divided, as he mentioned, the closing
2 here into three principal sections:

3 First, I'll address the issues concerning the contract
4 and the terms and the CISG and the interaction between those
5 two.

6 Second, Mr. Weiner is going to address, as he
7 mentioned, the factual liability issues that were discussed
8 throughout the trial with particular attention on the expert
9 testimony that was offered by Mr. Martin East and Mr. John
10 Minton.

11 Then, finally, you will hear from me again briefly to
12 discuss some of the issues with regard to damages.

13 First, let's turn to the contract. As we all know,
14 the case here centers on a May 17, 2005 contract executed
15 between Cedar Petrochemicals on the one hand and Dongbu Hannong
16 Chemical on the other. Dongbu in that role was the seller of
17 approximately 2,000 metric tons of phenol that was to be
18 delivered FOB in Ulsan Anchorage. In the parties' contract,
19 there is agreement on all of the major points that one would
20 expect: Price, quality, quantity, payment terms.

21 There are also two other important elements of that
22 particular contract. The first is the inspection clause that
23 was in that contract. Let me just read the words of the clause
24 so we can keep them in mind throughout the summation.

25 "Inspection by a mutually acceptable, independent

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1 surveyor whose findings as to quantity, quality as per shore
2 tank figures at load port are final and binding on both
3 parties." Then it discusses the fees to be split among them.

4 The parties, importantly, also have a clause in the
5 contract that is a merger clause. The parties agree that that
6 contract would be the parties' entire agreement.

7 So the principal legal question that your Honor needs
8 to address here is what is the effect of that merger clause.
9 That was a question that your Honor raised right at the outset
10 of the trial -- what interplay does that have here? Let's
11 first try to split the issues from which the merger clause will
12 have a legal effect and which it doesn't.

13 First and foremost -- and all parties agree here --
14 that the color specification is not something that is
15 implicated by this merger clause in the contract. As the Court
16 knows, the contract was signed on May 17, 2005, and all of the
17 evidence that has been presented with regard to an amendment to
18 that contract with regard to the color specifications occurred
19 after that date. As Judge Swain had mentioned in her summary
20 judgment opinion, that extrinsic evidence is defined as
21 evidence that is contemporaneous with or prior to the written
22 agreement that could be used at some later point to try and
23 change the terms.

24 So, the original term on that color specification was
25 6 maximum hazen units as per the Kumho specifications. The

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1 parties then amended that to be 10 max under the Ertisa
2 specifications, and that agreement was memorialized. The
3 agreement was memorialized in a few documents. It was
4 memorialized in a letter of credit that Cedar had applied for
5 and then paid Dongbu for the phenol. It was also amended by
6 another writing in the Dongbu commercial invoice that was
7 issued from Dongbu to Cedar that had the 10 max specification.
8 Again, that's not an issue that's put in play here by this
9 question of extrinsic evidence for the merger clause, and all
10 parties agree on that, as has been detailed in the joint
11 pretrial order.

12 But there are, as I mentioned, some issues that are
13 implicated by the merger clause. So, let's first take each
14 article of the CISG that Cedar contends has an effect on this
15 contract and try to go from there.

16 The first is Article 8 of the CISG covering extrinsic
17 evidence. As I just mentioned, your Honor, there has been no
18 evidence offered as to extrinsic evidence of any oral agreement
19 prior to, or contemporaneously with, the contract. So, there
20 is really not a question as to extrinsic evidence on
21 essentially any point with respect to the contract. There
22 simply was no precontract evidence that was offered that would
23 be extrinsic to the deal.

24 So, importantly, there is no extrinsic evidence that
25 was offered concerning the intent of the parties with respect

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1 to that merger clause. The merger clause means what it says
2 and it says what it means; that the parties' entire agreement
3 is encapsulated through that particular contract.

4 Without extrinsic evidence to rely upon to change or
5 derogate from those terms of the contract, Cedar relies first
6 on Article 9 of the CISG. Article 9 of the CISG contemplates
7 the parties' usage or usage in the trade

8 THE COURT: Before you go to that, just to make sure
9 I'm solid on the point before you leave it. Therefore, under
10 the terms of the contract, what was required at the time of
11 delivery to Cedar was a specification of 10?

12 MR. HUTTENLOCHER: That's correct, your Honor.

13 THE COURT: Under your view then, does it matter if
14 the phenol was injured before it passed the rail of the Bow
15 Flora so long as the specification at the time it passed the
16 rail and after it passed the rail was 10?

17 MR. HUTTENLOCHER: It shouldn't matter there, your
18 Honor. The reason why it wouldn't matter is that the parties
19 have a explicit inspection clause here that says that the ones
20 that were controlling were as of the time of loading, loading
21 from the Green Pioneer to the Bow Flora. That, as I mentioned
22 at the outset, that inspection clause was final and binding on
23 the parties. Those are the words that the parties used.

24 So, to bring in any evidence either under the Article
25 9 of the trade usage regarding petrochemical testing at large,

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1 and we would also submit to your Honor that there hasn't been
2 sufficient credible evidence presented by any competent witness
3 to provide that trade usage evidence.

4 But the extrinsic evidence point is point 8, I think
5 is slightly different than with -- so, to answer your question
6 a little more directly -- I think I did, but just to make sure
7 that I'm clear -- is that the inspection at the time of the
8 transfer from the Green Pioneer to the Bow Flora is what
9 mattered. When it passed the rail and was in the Bow Flora
10 tanks, it tested on specification. It tested on specification
11 at 4. That should be the set of inspection results that are
12 final and binding on the parties just as they agreed in the
13 contract.

14 THE COURT: So, from your view, even if I conclude --
15 and I'm taking you off your point a little bit, but answer this
16 and then return to your outline because it's helpful.

17 Even if I conclude that the phenol was injured in some
18 way between the shore tanks and the rail of the Bow Flora, you
19 still assert that you're not liable?

20 MR. HUTTENLOCHER: That would be our contention, your
21 Honor, yes.

22 THE COURT: OK. Please do return to your outline
23 because it's helpful.

24 MR. HUTTENLOCHER: Your Honor, I think in our colloquy
25 there, I covered Article 9 of the CISG. So, unless your Honor

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1 has any questions with respect to that, I'll move on to the
2 next point.

3 I think it piggybacks as well off of what we were just
4 discussing with what happens with this concept of if it was
5 injured prior to being on the Bow Flora and then some defect
6 should show up at some later point. That really is spoken to
7 in Article 36 of the CISG. In reading Article 36, again, you
8 have to read both Article 36(1) and Article 36(2) together.

9 So, Article 36(1) is that the seller is liable in
10 accordance with the contract in this convention for any lack of
11 conformity which exists at the time when the risk passes to the
12 buyer even though the lack of conformity becomes apparent only
13 after that time.

14 Now, Cedar has asserted that Article 36(1) would mean
15 that if the cargo was injured prior to passing the Bow Flora,
16 that essentially if there is any defect that shows up at any
17 point in time further down the road, that it would be Dongbu's
18 responsibility and Dongbu's liability there. Though if we read
19 36(1) and 36(2) in conjunction, 36(1) can't mean that. And
20 here is why I say that. Let me read 36(2).

21 36(2) is: "The seller is also liable for any lack of
22 conformity which occurs after the time indicated in the
23 preceding paragraph and which is due to a breach of any of his
24 obligations, including a breach of any guarantee that for a
25 period of time the goods will remain fit for their ordinary

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1 purpose or for some particular purpose or will retain specified
2 qualities or characteristics."

3 Now, when Cedar looks at 36(2), it focuses on the
4 second half of that language. It focuses on the "ordinary fit
5 purpose." However, in comparing Article 36(1) and Article
6 36(2), in trying to harmonize those two, I asked myself this
7 question: That if there was, for instance, a 30-day guarantee
8 in a contract -- and 36(2) explicitly speaks to breach of any
9 guarantee or an obligation under the contract -- that the cargo
10 will remain on specification or will have that same
11 characteristics essentially ad infinitum. That Article 36(2)
12 applies to a breach of an express obligation in the contract.

13 So the question in trying to harmonize the two, if,
14 for instance, there was a 30-day guarantee on the contract,
15 36(2) would apply. And -- but the defect, for instance, didn't
16 show up until 90 days later, well, then you would always fall
17 back on 36(1) to mean that any defect that should happen to
18 show up later down the road that the seller would always be
19 liable for.

20 But if you take that reading, it essentially renders
21 36(2) superfluous. Why would you need 36(2) if no matter when
22 the defect shows up, that the liability traces back to the
23 beginning? Your Honor, we would submit that you can't read
24 those two provisions of the CISG in harmony like that, but
25 they've got to mean something different.

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1 So what's different that it means? We would submit
2 that 36(1), rather, means that if there's a defect that
3 couldn't show up at the time of the actual contracting --
4 excuse me -- that the determination as to specification at the
5 time of the transfer of title from the seller to the buyer, if
6 there's a defect there that's covered, then that's under 36(1).

7 But if there is some sort of forward obligation that's
8 covered, that the party has an explicit obligation to make sure
9 that that specification carries on through for a particular
10 period of time subject to an agreement between the parties,
11 then that's when 36(2) applies. But the CISG doesn't impose
12 liability for a product just ad infinitum.

13 The other part about Article 36 is that there is a
14 conflict here. If you take Cedar's reading that 36(1) means if
15 the latent defect shows up at any point down in the road, then
16 Dongbu is liable if it can show that the injury happened
17 pretransfer. That conflicts directly with the inspection
18 clause that the parties had in their entire agreement in which
19 the figures from the transshipment were, as the parties said,
20 final and binding. 36(1) does not provide Cedar with multiple
21 apples or multiple bites at the inspection apple as things
22 proceed, but, rather, the parties agreed to that explicitly.

23 THE COURT: Why couldn't that be a way of having a
24 limit to the ad infinitum theory? That is to say, well, we
25 would be concerned here that injury before that doesn't become

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1 detectable till later but suggests some sort of continuing
2 liability ad infinitum. So we'll put an inspection process in
3 place that gives us a stopping point.

4 MR. HUTTENLOCHER: Your Honor, if that's what the
5 parties agreement and the words that they use in the contract
6 was, I would agree with you, but it's simply not. It's that
7 the inspection figures at the time of the transshipment are
8 final and binding. If they wanted to have a further
9 description, it's not that would displace otherwise provisions
10 of the CISG then they could have done that, but they just
11 didn't.

12 THE COURT: So, in other words, in your looking at
13 Exhibit 80, in your reading of the inspection clause, I need
14 look no further than after loading 4. Is that right?

15 MR. HUTTENLOCHER: You just have to look at the top
16 line.

17 THE COURT: Top line, call it for lack of a better
18 term, the contemporaneous one.

19 MR. HUTTENLOCHER: For the contemporaneous testing at
20 this time of the original transshipment. That's what we would
21 submit your Honor would only have to look at. We would further
22 describe and Mr. Weiner will further describe.

23 THE COURT: I will let you further describe.

24 MR. HUTTENLOCHER: So I'll leave it at that.

25 Your Honor, just one final point with respect to these

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1 inspection provisions here. We would also submit that -- just
2 to make a couple small factual points about the subsequent
3 analysis that was done in Korea -- is that just to keep in mind
4 for your Honor is that prior to attending the joint analysis
5 that was conducted in Korea in August, Dongbu submitted a
6 letter expressing the exact same position that I've expressed
7 to you this morning: That the transshipment figures are the
8 ones that control. It tested on specification; and that there
9 was no further inquiry; and that Dongbu is sorry that there was
10 a problem, but it's not their responsibility.

11 There has been an intimation in the papers from Cedar,
12 if not an outright claim, that by attending the joint analysis
13 that somehow there is a waiver. However, in that instance, a
14 waiver needs to be an actual intentional waiver of a known
15 right. Here, by Dongbu attending those -- it had already
16 preserved its position on the record with the particular letter
17 and was not intending to, and there is no evidence that they
18 were intending to, waive that right by attending the Korean
19 analysis.

20 So that's where we leave the point with respect to the
21 contractual issues. If it's all right, I'll turn it over to
22 Mr. Weiner.

23 THE COURT: Thank you.

24 MR. WEINER: Good morning, your Honor.

25 THE COURT: Good morning, Mr. Weiner.

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1 MR. WEINER: My portion of the argument is really
2 going to direct itself to the burden of proof that must be met
3 here. We had argued before Judge Swain that this was
4 essentially a failure of proof case; that the plaintiff could
5 not base upon the record established by preponderance of the
6 evidence that the phenol was injured before it was loaded in
7 the Bow Flora.

8 THE COURT: Right.

9 MR. WEINER: I believe that at this trial we have
10 demonstrated that they have not met their burden.

11 In its simplest terms, this is a case where Martin
12 East, who is both an expert and a fact witness, was a
13 supervisor there with minimal experience in phenol who rushed
14 to judgment. What made it worse, he knew that he had rushed to
15 judgment in August of 2005 when he submitted his report and
16 made it very clear that he wasn't sure what the results were.
17 He needed more documents and tests should have been done, and
18 none of that was completed.

19 So let's look at the evidence as we know it came in
20 through the trial.

21 Minton, Treharne & Davies was retained on July 21,
22 2005 to investigate the fact that the phenol was over 500 on
23 the hazen scale. East was designated as the surveyor
24 responsible to oversee the investigation. East acknowledged he
25 had no training in phenol for chemistry. He had handled only

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1 one phenol claim in eleven years with MTD. He was certainly
2 self-acknowledged he's not an expert. He doesn't even know
3 what the forensic standard is that constitutes chemical
4 investigations. He also stated that he was well aware that MTD
5 employed chemists, scientists, analysis people, and that none
6 of them were contacted by him in connection with his
7 investigation.

8 We also know that Mr. East was supposed to be
9 supervised by Mr. Minton, who may have some of that expertise,
10 but we know also that Mr. Minton was on vacation the entire
11 time that Mr. East was conducting his investigation and doing
12 his report; and by Mr. Minton's own words at his deposition, he
13 had not supervised Mr. East, and Mr. East was not supervised at
14 all.

15 But Mr. East did acknowledge certain things about
16 phenol that he knew before he did his investigation. He knew,
17 for example, that phenol, the color change in phenol is "a very
18 poorly understood subject even with a great deal of research."
19 He knew that the recommended temperature for storing and
20 transferring phenol is 50 to 55 degrees Celsius. He also knew
21 that transporting phenol at temperatures exceeding 55 degrees
22 coloration of the phenol can occur. He also knew that in
23 general, the lower the temperature in the 50 to 55-degree
24 range, the better.

25 Mr. East acknowledged -- and this is a critical

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1 point -- that the literature states that when phenol is stored
2 in ambient conditions; that is, without being heated, it
3 remains colorless for a number of weeks and a color change can
4 thereafter occur. As Mr. East acknowledged, that color change
5 could easily be 10 to 35 on the hazen scale after the material
6 is stored in ambient conditions for "several weeks" or a number
7 of weeks.

8 Finally, Mr. East acknowledged that when phenol is
9 transported, it should be maintained in a controlled and
10 unchanged temperature. In my reading of the document, it's a
11 constant temperature, even though Mr. East took issue with
12 that.

13 Mr. East also stated that he was aware of the Ertisa
14 heating instructions, which is Exhibit TT. He was aware,
15 according to Ertisa, that the skin temperature of the heating
16 coils should not exceed 60 degrees Celsius at any time. He was
17 aware that the heating instructions established that the master
18 must keep the temperature between 50 degrees and 55 degrees
19 Celsius; and he was aware -- and this is critically important
20 to this case, -- that in the event the vessel wishes to
21 increase the temperature of the cargo, such increase is not to
22 exceed one degree Celsius within a 24-hour period. As Mr. East
23 acknowledged during cross-examination, he was well aware that
24 phenol is inherently unstable, and that increasing the
25 temperature more than one degree Celsius in a 24-hour period

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1 could cause discoloration. He knew all of this before he did
2 his investigation.

3 We also established that within MTD's library, there
4 are a number of articles talking about phenol. In fact,
5 Mr. Minton provided us with several of them. According to
6 those articles, adding water or other contaminants to phenol
7 caused an immediate and noticeable color change. Something
8 that happens instantly; and at least one of those articles said
9 it can't even measure how quickly it occurs. I had read those
10 into the record when I was cross-examining Mr. Minton.

11 Shortly after he had begun his investigation, Mr. East
12 became well aware that there were two sampling companies that
13 were involved here: SGS, which was Cedar's choice of
14 inspector, and GSI, which was Dongbu. Mr. East further
15 acknowledged that he was aware that there were four basic
16 categories for these samples. There were shore tank samples.
17 There were Green Pioneer composite samples. There was Bow
18 Flora first foot samples. And the reason for that was to test
19 for possible scalding as the phenol is then put onto the Bow
20 Flora. And then there is the Bow Flora full tank running
21 samples. As Mr. East explained, a running sample is meant that
22 you take phenol from the bottom to the top so you have a basic
23 good idea of what's in the full tank.

24 Mr. East finally acknowledged that he was aware that
25 both SGS and GSI maintained copies or maintained separate

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1 samples in Korea. One set was loaded on the Bow Flora, and one
2 set was maintained in Korea. So there were essentially three
3 samples taken by each company for each category. One was
4 analyzed on May 24, one kept in Korea, and one placed on the
5 Bow Flora.

6 Mr. East also acknowledged that the samples were
7 maintained in an unheated and un-air-conditioned sample locker,
8 although he did not know much beyond that because he never
9 asked anyone about it, but, he said under normal conditions,
10 samples are kept in these sample lockers, and, therefore, that
11 turns them into solids because they're being now stored in
12 ambient conditions. We have to keep in mind that this voyage
13 was eight to nine weeks on the Indian Ocean during the summer.
14 And no one at this trial was able to provide any insight as to
15 whether these samples were on the same shelves, different
16 shelves. We just don't know. Mr. East did acknowledge and
17 never asked anyone about it.

18 So, the first thing is the Rotterdam results. As
19 Mr. East stated, the purpose of the Rotterdam joint analysis
20 was to determine whether there was, in fact, a color change.
21 But Mr. East -- in fact, just to quote it as he stated. The
22 purpose of the Rotterdam testing was "to establish whether or
23 not there had been a color change." Interestingly, Mr. East
24 had already come to a conclusion, at least a preliminary
25 conclusion, based upon his reading of the -- not even the

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1 Rotterdam test results, just the fact that the phenol was off
2 color. And in his July 27, 2005 email to Robert Sparrow, he
3 concludes it's likely that the cause of the phenol numbers was
4 "an instability in the material through its manufacturer" -- In
5 other words, an inherent defect. And that was his mindset
6 going in.

7 He gets the Rotterdam results, and one of the things
8 that's remarkable about the Rotterdam results is there are no
9 consistency and you have Exhibit 80. I don't have it in front
10 of me but your Honor can see it. I think I have a copy of it.
11 So we know the Rotterdam results that are the results are all
12 over the lot. For example, with respect to the after-loading,
13 which is the full tank, it's below 35 to 40 with a high of 100
14 to 150. Mr. East could provide no guidance as to how that
15 could be. With respect to the SGS sample, that was actually
16 the highest. The crew sample was the lowest.

17 Similarly, there are other discrepancies in the Green
18 Pioneer composite sample. There was a significant difference.
19 Again, Mr. East could not explain how that came to be.
20 Nevertheless, he concluded based upon those results in Exhibit
21 N, he writes an email saying that the phenol is color unstable
22 due to its inherent properties. So he already reached that
23 conclusion. He just reinforced his conclusion irrespective of
24 these Rotterdam results. He sends an email to Mr. Sparrow in
25 which he states that. Ertisa was not satisfied. They felt, as

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1 stated in Exhibit Q, that the Rotterdam results were
2 inconclusive. And that was confirmed yesterday during the
3 deposition of the Ertisa representative.

4 So, a decision was made that there would be a Korea
5 test, and the Korea test would be for the purpose of
6 determining where the -- I'll quote it. East testified that:
7 "The analysis in Korea was actually the investigation to where
8 that discoloration occurred."

9 What's interesting about that test is at the time it
10 was done, Mr. East was aware that only four samples were being
11 tested. Yet, paragraph 26 of his declaration, he states that
12 "In the circumstances as were present here, what the surveyor
13 should do is jointly arrange for all available samples drawn
14 over the course of the cargo's transport." And we know that
15 was not done.

16 Now, Mr. East suggests that the reason that was not
17 done, it was really up to the parties to somehow bring their
18 samples to the testing; and he acknowledged he has no idea what
19 the parties were told. But we do know some things. We know
20 that on July 21, 2005, Dongbu, as Mr. Huttenlocher had already
21 stated, had written a letter stating we have no further
22 responsibility in this matter. But that letter also states,
23 however, we will do our best if we can help you.

24 So, the fact that they attended, in my mind, as
25 Mr. Huttenlocher stated, is not an indication that they were

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1 going to bring their samples. But Mr. East further testified
2 when he was being examined by Mr. Lillis that it was customary
3 for the local representatives to bring samples to the joint
4 sampling.

5 In fact, your Honor, there's an Exhibit that we did
6 not highlight during the course of the trial, but if you look
7 at Exhibit 65, that's the report of Peter Duguid. It's dated
8 August 29, 2005. No one from GSI was present at the joint
9 sampling. There is no evidence that anyone asked GSI to appear
10 at the joint sampling or to bring samples to the joint
11 sampling. But Mr. East was well aware that those samples
12 existed.

13 In any event, the joint sampling is done on the four
14 samples.

15 THE COURT: If you can try to stay clear of the mike
16 on there, Mr. Weiner.

17 MR. WEINER: Yes, I will.

18 THE COURT: It's just hard to hear you when you do
19 that.

20 MR. WEINER: Yes. These are the results of the Korea
21 test which was to determine where this discoloration occurred.
22 Mr. East and Mr. Minton acknowledged that sample D, which is a
23 shore tank, which is a 3 to 5, demonstrated no inherent defect.
24 Therefore, that eliminated as a potential, the fact that the
25 phenol was inherently -- there was something wrong with the

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1 phenol from the manufacturing process.

2 What we do have is the most important what we would
3 assert is sample A which is on spec. When I asked Mr. East
4 about that, how do you explain sample A? Why wasn't that
5 dispositive. That was what the spec. was. His response was --
6 I'm sure your Honor remembers it -- "It's an oddity. It's an
7 oddity. Maybe it was something to do with the way the sample
8 was taken," which is an absurd position in view of the fact
9 that Mr. East made it very clear in determining blame or fault,
10 you look at the samples. He could offer no explanation.

11 Mr. Minton was asked the same question, and at his
12 deposition, Mr. Minton said the same thing. "I can't explain
13 it."

14 In his declaration, Mr. Minton says, well, maybe there
15 was some process where it hadn't yet spread, you know, that it
16 was really there but just didn't show up in the sample. When I
17 asked him, well, what tests did you do to try and determine
18 whether that theory has any viability, he hadn't done any
19 tests. Something he came up with off the top of his head.

20 And, quite frankly, that theory is actually belied by
21 the literature, the scientific journals that he had provided to
22 us which showed that when a contaminant is put in the phenol,
23 there's almost instances color change. So, your Honor, I start
24 with we have a two samples from A and D both on spec. That's
25 what counts here under the contract. We passed two times. But

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1 we do have samples B and C to talk about.

2 THE COURT: Before you leave the first two, I suppose
3 one of the things that East and Minton would say is, "Well, one
4 thing you can see between the shore tank and the Bow Flora full
5 tank is that the color got worse."

6 MR. WEINER: Well, but it didn't. If you look at --

7 THE COURT: 10 is higher than 3 to 5.

8 MR. WEINER: Yes, the color got worse. Absolutely, it
9 got worse because Mr. East acknowledged that it's stored in
10 ambient conditions. It had been stored in Korea for three
11 months, from May till August when it was tested.

12 THE COURT: But the shore tank sample of 3 to 5 was
13 stored -- tell me if this is right. A question: Was the
14 sample used at the joint analysis taken from the shore tank,
15 was that stored in the same conditions as the joint analysis
16 testing from the Bow Flora full tank?

17 MR. WEINER: We don't know. No evidence of that one
18 way or the other. But Mr. East did say that it doesn't always
19 change color with ambient conditions. We just don't know. We
20 don't know if it was in the same place, same shelf. No way to
21 determine. But we do know -- and 4 to 10 your Honor is not a
22 particularly significant change of color. As Mr. East said,
23 it's still colorless, and that's in fact the color that was
24 accepted here. So we know 10 is 10. How it got there, I would
25 suggest to you is because it was stored in ambient condition

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1 and there was a slight color change.

2 THE COURT: But is it not a data point that that
3 increases there?

4 MR. WEINER: I think that's something you would expect
5 to have happen. You expect to have some color change because
6 it's in ambient conditions. That's the norm.

7 THE COURT: But he's got an expert saying that it's a
8 data point. Do you have anything to rebut that it's a data
9 point?

10 MR. WEINER: No. It's a data point, but the point is
11 it's a data point that happens to be on spec. It's not off
12 spec. It's not 500. It's not a hundred. It's not 50. It's
13 on spec.

14 THE COURT: That's why it's a data point.

15 MR. WEINER: Yes, it's a data point, and I agree with
16 you, and I'm happy to take that data point because it is on
17 spec. It certainly doesn't show the other kind of changes that
18 are on Exhibit 80. It gets better. It doesn't get worse.

19 Exhibit 80 reflects for the full tank, according to
20 the three samples, anywhere from 100 to 150 which is the SGS
21 sample, the 60 to 70 which is the GSI, and the 35 to 40 which
22 is the crew. You would have expected -- and, remember, under
23 the seeding theory, the seeding theory is that it progressively
24 gets worse. This didn't progressively get worse. This got
25 marginally different due to the storage in ambient conditions.

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1 There is no indication of some kind of significant
2 contaminant or other cause that made this get worse. You would
3 have expected, quite frankly, if there was the seeding theory
4 at play, that the 10 would have been at higher than 35 to 40
5 and possibly as high as 150. It don't get better. It could
6 only get worse. That's the seeding theory. It's progressive.
7 It continues to get worse, and gets really bad when you heat
8 it. So, this, if anything, belies the heating theory, as does
9 the other portions of Exhibit 80.

10 But if I may continue?

11 THE COURT: Please.

12 MR. WEINER: So we have two other samples. We have
13 sample B. Let's start with sample that's 20 to 30. There are
14 two possible explanations there. Sample B could be something
15 that occurred on the Bow Flora on May 24. Remember, this is
16 the first foot.

17 THE COURT: I'm sorry, could you give me the 80 back?

18 MR. HUTTENLOCHER: Certainly, your Honor.

19 THE COURT: 80 is the most useful to me. Lift it up,
20 please. Thank you.

21 MR. WEINER: So 80 is the first foot.

22 THE COURT: 80 is the first foot. What does that
23 mean?

24 MR. LILLIS: What are you talking about?

25 MR. WEINER: I misspoke. B. Thank you. I misspoke.

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1 First foot, your Honor, as you recall --

2 THE COURT: I know what the first foot is.

3 MR. WEINER: Sample B is the first foot, which does
4 not appear on, as I see it, on Exhibit 80. Now, the first
5 foot --

6 THE COURT: I'm sorry?

7 MR. WEINER: I'm looking at Exhibit 80. I have it on
8 my Exhibit, but I don't believe it's on -- I take it back.
9 It's there. It's over there under the Bow Flora.

10 So there is another example of where the test in Korea
11 has a lower result than the sample that was kept on the Bow
12 Flora. Again, inconsistent with the seeding theory. The
13 seeding theory should have been that sample B should have been
14 at least 60 to 70, probably more than that, but it's not.

15 Now, there are other issues with sample B that we
16 should talk about. This is the day, May 24, 2005, when the
17 phenol was delivered on to the Bow Flora, and this is the first
18 foot, that, as Mr. East said, you measure to see if there was a
19 scalding.

20 Now, this 20 to 30 number could be due to: (1)
21 possibly overheating during the first foot process when it was
22 loaded. It could be due to the fact that the sample was stored
23 in ambient conditions; but we don't know. We also don't know
24 what the heating records were for May 24. If you recall, your
25 Honor, the heating records that were provided to us start with

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1 May 25. So we would have to speculate as to what happened
2 regarding sample B. Was it caused by overheating? Was it
3 caused by ambient conditions? Was it caused by something bad
4 in the phenol? We just don't know.

5 THE COURT: If it were caused by overheating, wouldn't
6 you expect the May 20 test of the Bow Flora first foot to be
7 higher than 4?

8 MR. WEINER: No, because I don't know when the
9 overheating might have occurred. I don't know when they took
10 it in terms of context. I don't know -- the answer is, I don't
11 know. I don't know how I would respond to that, your Honor.
12 Let me think about that.

13 So, we don't know if that heat was put on and kept on
14 all day that caused -- I just don't know how to answer other
15 than to say no one knows. It's possible. That's the problem
16 with this case. You're being asked to speculate as to what
17 might have happened without ample proof. All we do know is
18 that when we get to sample B, it's less it's 20 to 30, again,
19 within that range of color change.

20 THE COURT: Let me get to a sort of summary question,
21 which is to that point. It seems to me that there is a signal
22 and noise problem. I mean, the data, I don't think can, in a
23 uniform way, explain all -- all of the data seems to point in
24 some different directions, and you focus in on one thing and
25 something else becomes hard to explain.

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1 MR. WEINER: Correct.

2 THE COURT: That sort of is your proof problem
3 argument; that, well, if this data is confusing, and it doesn't
4 quite point one way or the other, it's their job to show that
5 it's more likely than not that it's one thing.

6 Part of what your task is to show is how any
7 particular data point that their experts are relying on has
8 some difficulties and problems with it.

9 But one of the things that their experts do is to say,
10 yes, I can't say exactly where it happened, and I can't say
11 exactly when it happened, and, no, I can't really explain A,
12 but one thing I can tell you is that if you look at all of the
13 data points up on that big chart, it tells a story, at least,
14 that whatever is going on here started to happen before the
15 rail of the Bow Flora. And then your rendition of that I think
16 so far has been -- well, go ahead.

17 MR. WEINER: There are several your Honor. First of
18 all, the data points in Korea are consistent with something
19 being stored in an ambient condition.

20 THE COURT: You mean August 8, right?

21 MR. WEINER: Yes. OK, that's consistent with the
22 acknowledge --

23 THE COURT: Just as a terminological matter, May 20
24 was in Korea too.

25 MR. WEINER: That's correct, your Honor.

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1 So, the data points in Korea are consistent with the
2 ambient discoloration just caused from normal being stored as a
3 solid. That's number one.

4 Number two, the real problem here is there was a --

5 THE COURT: I just want to make sure I have my head
6 around that point. What was that first point?

7 MR. WEINER: First point is we know from the
8 scientific textbook that when you store phenol for a number of
9 weeks in ambient conditions, it will turn color just because
10 it's in a solid condition. We know that. There will be a
11 color change. Mr. East acknowledged that. It's in the books.
12 It's in the record.

13 THE COURT: So given that, wouldn't you expect D to be
14 higher than it is?

15 MR. WEINER: No, it got higher -- it got higher than
16 it was back in -- D. I'm sorry. The answer is I don't know
17 how that was stored. They say that not every one turns color.
18 I don't know why. I would have expected it to turn color. I
19 don't know why.

20 THE COURT: But it was stored as a solid, right?

21 MR. WEINER: Yes. I agree. I don't know. I'm not a
22 scientist. All I know is that --

23 THE COURT: You could have brought one in.

24 MR. WEINER: Well, I don't think if I would have here
25 that it's going to change anything. No one understands this --

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1 let's go back to what Mr. Minton said.

2 Nobody understands how or why phenol turns color. It
3 is a science that is very unclear. We know it turns color. We
4 know it's unstable. We don't know when it will and when it
5 won't. And I will get to the Bow Flora in a minute, your
6 Honor. But I do want to point out other thing.

7 THE COURT: Just a second, because there is a little
8 bit of this tendency that sort of you focus in on one point and
9 then you switch to another. But what you started with was the
10 first point, we know from the scientific textbook that when you
11 store phenol for a number of weeks in ambient conditions, it
12 will turn color just because it's in solid condition. Do we
13 know that?

14 MR. WEINER: Yes, that's what the book says.

15 THE COURT: There will be a color change. When I ask
16 that given that what we know scientifically to be true,
17 wouldn't you expect D to be higher?

18 MR. WEINER: Yes, I would have.

19 THE COURT: OK.

20 MR. WEINER: I would have. Why it wasn't, I don't
21 know, but I would have.

22 THE COURT: So, then let's see what data point we can
23 extract from that. That would suggest if D is an accurate
24 sample, that simply storing in a solid form in ambient
25 temperatures would not, at least always, lead to an increase in

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1 hazen units.

2 MR. WEINER: That's correct. I would say that's
3 correct. And I don't know how you can tell one from the other.

4 Now, there are other things you could have done though
5 that would have helped you out or would have helped them out.
6 Both Mr. East and Mr. Minton acknowledged that back in August
7 of 2005, there were tests that could have been done, simulation
8 tests, among other things, chemical analysis of the samples to
9 see if they contained any contaminants. So they would have had
10 a greater picture of what was going on here and been in a
11 position to determine what the cause was.

12 Mr. East in his report recommends doing those tests
13 and Minton confirms those tests are valid. They could have
14 taken the samples they had. They could have heated them to see
15 whether the heating caused greater degradation than there was.
16 They didn't do that. That was easily done. They could have
17 simply taken the samples, put them into an oven, as Mr. Minton
18 explained, and you heat it for the period of time at 55 degrees
19 for the period of time of the voyage and see what happened.
20 They could have done that. You could have looked at the
21 samples to see whether the samples had contaminants. But
22 equally important, you could have gotten the SGS samples which
23 were still in Korea and tested those too to see what those
24 numbers showed.

25 None of that was done, your Honor. Not only was none

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1 of it done, by the time my client was actually told there was a
2 lawsuit, those samples are gone because they're only kept for
3 90 days.

4 THE COURT: Those are valid points, and I suppose the
5 experts' response to that is, yes, I would have liked that. It
6 would have helped me know what was the cause, and it would have
7 helped me pinpoint the when was the cause, but the failure to
8 have that data, they say, doesn't undermine, again, any sort of
9 big picture examination of all of the data points, which is
10 difficult to discern exactly what happened, but one thing they
11 say can be discerned is that it happened before the Bow Flora.

12 MR. WEINER: I understand. And I just want to finish
13 up with Sample C, and then I'm going to turn to that.

14 THE COURT: OK.

15 MR. WEINER: Sample C, we have the sample which is 30
16 to 50. That is the only sample in this case which has small
17 matted material described as a rag-like material by Mr. East.
18 Mr. East acknowledges that there were three possibilities
19 regarding that. One is the rag-like material was in the
20 container at the time it was tested. Nowhere else. By the
21 way, he did acknowledge that no other container contained any
22 rag-like material, just this one. Or it could have gotten into
23 the container during the testing process itself. Or it could
24 have been in the phenol itself. So we have three
25 possibilities, none of which were ever explored.

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1 One of the things they could have done is found the
2 composite for the Green Pioneer that the GSI had taken and
3 tested that to see if that had any particles, but they didn't
4 do that. The fact of the matter is we don't know, and Mr. East
5 doesn't know, whether the matted material itself caused a color
6 or degradation.

7 Let's go back to what your Honor was just asking me.
8 They said, well, we conclude -- we may not know where, may not
9 know why, may not know how. The only thing we do know it's
10 before it got on to the Bow Flora. And the only theory they
11 have said that supports that position is the seeding theory.
12 That's the one they told you about it's the essential one in
13 their case. That's what Mr. Lillis said in his letter the
14 other day to your Honor.

15 THE COURT: You are right that it is going to be a
16 necessary step, but first I think they say we can see between D
17 and C -- well, one, I guess we know at the end of the day in
18 Rotterdam, you have off spec. stuff, right?

19 MR. WEINER: Yes.

20 THE COURT: That's a data point.

21 MR. WEINER: No dispute.

22 THE COURT: Wildly off spec., apparently.

23 MR. WEINER: Wildly off spec.

24 THE COURT: We know that we have, at least looking at
25 the August 8 test, we've got an off spec. result at C.

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1 MR. WEINER: Correct.

2 THE COURT: And we have an increase between the D and
3 C. And then although the Rotterdam data is sending some noise,
4 it all shows off spec, including two tests that are 3 and 5,
5 which are both starting to show an increase in hazen unit.
6 Now, that doesn't have anything to do with the seeding theory
7 yet, right? That's just data.

8 MR. WEINER: Well, the data is looking at the results
9 in August because it got better. It didn't get worse. It goes
10 from 30 to 50, which are the small particles, which could be
11 due to whatever the source is, we don't know. Then goes down
12 to 20 to 30, and then goes down to 10. It didn't get worse.
13 It got better.

14 THE COURT: But that does not refute in and of
15 itself-- in other words, they don't need the seeding theory,
16 right? I think they do need the seeding theory to explain some
17 things, but they don't need the seeding theory to explain that
18 test C is off spec. and it happened before the Bow Flora.

19 MR. WEINER: Yes, and I said that. I said one of two
20 things could have happened there, your Honor.

21 THE COURT: They don't need the seeding theory exactly
22 to say that all of the tests -- there might be some
23 inconsistent -- it might be a line that the graph might not go
24 up at an even rate, but it might go up at points until it gets
25 to 500 in Rotterdam, to show that all of the tests between -- I

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1 lost my track there. Go ahead.

2 MR. WEINER: The fact is that they do need the seeding
3 theory, your Honor, because they need to find some way to put
4 all these pieces together. As your Honor said, you could start
5 looking here or there or wherever. It's like Rubik's cube, and
6 drive yourself crazy looking for the logical explanation, and
7 there are certain things you can't run away from. One of the
8 things you can't run away from them was a 10. So they come up
9 with a seeding theory, and the fact of the matter is the
10 seeding theory is belied by the very chart that they pointed
11 you to.

12 THE COURT: Sorry, just a second. It seems to me that
13 both of you at some level have -- that there is an assumption
14 on both sides that not all samples are accurate, right?

15 MR. WEINER: I'm not taking that position. I will
16 take each sample amount as it is.

17 THE COURT: The Rotterdam samples?

18 MR. WEINER: I'm not saying they're not accurate. I
19 said there are explanations for them. I'm not challenging
20 their numbers.

21 THE COURT: Well, it turns into an epitemological
22 debate, but I don't mean that it was tested wrong, that
23 something went wrong with -- that is to say, the sample
24 numbers, you don't believe that all of the sample numbers
25 accurately reflect the state of the cargo at the time that the

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1 sample was extracted.

2 MR. WEINER: No. What I believe -- and I was about to
3 get to it -- is that whatever happened here happened on the Bow
4 Flora. I understand their experts have concluded that it
5 didn't happen on the Bow Flora. We don't know, and they can't
6 explain why you have different numbers for the samples that
7 were kept on the Bow Flora. We just don't know.

8 But, more importantly, let's talk about the heating
9 records that they so anxiously wanted to get into this case.

10 THE COURT: I can't hear you when you're shuffling.

11 MR. WEINER: I know. I just want to get there.

12 We looked at those heating records, and this is what
13 we found from looking at those heating records. We know that
14 while it is desirable to keep the phenol in the lower part of
15 the 50 to 55-degree range, the phenol was only below 54.2 for
16 four of the 113 time measurements. It was kept at a very high
17 range.

18 We know that even though the phenol was supposed to be
19 kept at a constant temperature, the temperature varied between
20 55.5 degrees Celsius and 55.9 degrees Celsius which is almost a
21 degree above the maximum temperature.

22 We know that even though the heating temperature was
23 not to exceed 55 degrees Celsius, the temperature exceeded
24 55-degree Celsius on 27 occasions and was as high as 55.9, as I
25 stated a moment ago.

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1 We also know that in the period between June 28, 2005
2 and July 2, 2005, which is a five-day period, the heating
3 temperature went from 55.9 degrees down to 53.5 degrees, which
4 is a 2.4-degree change in a very short period when the phenol
5 is supposed to be stored at a constant temperature.

6 Finally, we know that between June 25, 2005 and
7 July 3, 2005, the temperature changed more than one degree in a
8 12-hour period rather than a 24-hour period on three separate
9 occasions. 1.3 degree change on June 25, 2005; 1.1 degree
10 change on June 28, 2005; and a 1.4-degree change between the
11 evening of July 2 to the morning of July 3, 2005.

12 I would suggest to your Honor that those numbers are
13 far more important in terms of explaining why this cargo was
14 off spec. I would also remind your Honor that when you
15 asked -- I'm not sure if it was you or me but when we asked
16 Mr. --

17 THE COURT: You'd probably be better if you suggested
18 it was me. I'm just kidding.

19 MR. WEINER: When we asked Mr. East whether those
20 temperature changes could affect the color of the phenol, could
21 cause the color to go off spec., he said yes. Phenol is an
22 unstable chemical, which he acknowledged. And those kinds of
23 bouncing around and deviation from the heating instructions
24 that were given by Ertisa in our view demonstrates that the
25 cause of the problem was the Bow Flora.

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1 All of this other stuff about the samples, for all the
2 reasons that we have been talking about, we just don't know
3 enough. We can't draw any conclusions. We don't know how they
4 were stored on the Bow Flora. We don't know how they were
5 stored in Korea. We have the results. I'm not challenging the
6 results. They are what they are. I can point in this record
7 to a specific series of events that would have caused what
8 Mr. Minton called numbers he had never seen; shockingly high
9 numbers.

10 THE COURT: Two points about that, if you could
11 address: (1) That doesn't in any way deal with sample 3, 5 and
12 C; and (2) one of the things their expert said is that, yes,
13 the stuff might have gotten overheated and that might
14 explain -- this is my gloss on it or let me suggest a possible
15 gloss on it -- that it wouldn't have had the effect it did.
16 The heating wouldn't have had the effect it did had there not
17 already been a problem with the phenol.

18 MR. WEINER: So let's talk about that. I think
19 Mr. Minton said he reached his conclusions on 3, 5 and C, and I
20 said to him -- that's how he came to his seeding theory. First
21 of all, C is better in terms of score than 3 and 5, and it
22 shouldn't have been.

23 Secondly, C is the one canister that had the matted
24 material. So we didn't even know if C is a fair representation
25 of what the Green Pioneer loaded hazen color was. It had a

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1 contaminant in it that was never tested, never determined it
2 came from the Green Pioneer. It could have been in the
3 canister itself. So just to rely on C, as I said earlier, you
4 can't just rely on C.

5 What they should have done because there was a
6 parallel GSI canister that everyone knew was there. The 40 to
7 50 is a GSI container. They should have gone and gotten that
8 container and tested the phenol in that, and then you would
9 have a true picture. One, you could see whether there was a
10 contaminant or not; but, putting that aside, you would have had
11 a true number.

12 The number 30 to 50 is a bogus number here. It's a
13 number you can't rely on because it has this other element that
14 is in no other container and no one knows whether that rag-like
15 material affected the color change. And I would suggest it
16 probably did because phenol is so unstable. So you can't just
17 narrowly focus on those three numbers, your Honor. You just
18 can't get there.

19 And there are things they could have done. That's
20 what really is the troubling part of this. Things they could
21 have done that they didn't do.

22 Just going back for a moment to their experts in terms
23 of what I would call bias. These are guys who reached a
24 conclusion that was wrong and then defended the wrong
25 conclusion and began to find theories to try and position the

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1 results to fit their theories rather than look at all the
2 results and come up with a viable theory. These are not true
3 experts in the normal sense of the word -- people that come in
4 after the fact they look at these things and come to an
5 independent position.

6 These guys, first of all, East had a position he was
7 representing an insurance company that wouldn't pay for the
8 test that should have been done; and Minton came in to
9 basically protect East. So, your Honor, I don't believe that
10 just relying on, as Mr. Minton does, Exhibits 3, 5 and C get
11 you there.

12 In any event, it doesn't address all the heating
13 records. No one from their side ever explained what I just
14 went through with you in terms of what happened on the Bow
15 Flora. They turned a blind eye to that. They never even
16 sought those heating records. It wasn't until we made a point
17 in this case said, "Don't you think you ought to be looking
18 into the Bow Flora heating records?" They didn't think it was
19 relevant. It didn't have any bearing. They had come to a
20 conclusion. This is an effort to justify that conclusion, your
21 Honor. It's not based upon any scientific analysis or any kind
22 of real expertise.

23 THE COURT: Mr. Weiner, you are almost out of time.

24 MR. WEINER: And I'm done. I don't have anything else
25 to say, your Honor.

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1 THE COURT: You omitted from the introductory outline
2 damages.

3 MR. WEINER: Do I have two minutes to address damages?

4 THE COURT: I'll add two minutes to both sides.

5 MR. WEINER: Thank you.

6 MR. HUTTENLOCHER: Thank you, your Honor. I will keep
7 in mind the two minutes and try to move quickly without
8 speaking too quickly.

9 THE COURT: Thank you.

10 MR. HUTTENLOCHER: There are essentially three pieces
11 that I just want to address shortly on damages. The first with
12 respect to one of the things that Mr. East had said during the
13 questioning, whether it was during cross or during your Honor's
14 questioning was that he acknowledged that some of the
15 degradation of the phenol color could have been caused by
16 overheating while on the Bow Flora.

17 So, to the extent that there is any damage by
18 overheating, and the heating records, as Mr. Weiner has
19 described, there are violations of the heating instructions and
20 that could have caused additional or some sort of additional
21 degradation on the Bow Flora, which, if it's injured past the
22 rail of the Bow Flora, then that jury is on Cedar and is
23 Cedar's responsibility.

24 One of the things that could have mitigated those
25 damages, but Cedar has offered no evidence on that, is a common

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1 industry practice that Mr. Irisarri spoke about yesterday, and
2 that is the concept of blending. So, even if we look at sample
3 C, and we've got that result of 30 to 50, and if that was the
4 color, putting aside the fact that it could have been caused by
5 the matted material that's in sample C, is that the Bow Flora
6 then overheated that phenol further damaging it. And
7 Mr. Irisarri directly testified that if a cargo of 30 to 50 had
8 arrived in Rotterdam, it could have been blended. This wasn't
9 just a hypothetical exercise that he was engaging in. He said
10 he's done it before. But there is no evidence with damages
11 that Cedar has in that regard.

12 THE COURT: So, the basis of that theory is, let's
13 assume something happened. Let's take their expert's position
14 that something happened before the Bow Flora, but their experts
15 have said it could have also been overheated. So we can't
16 possibly separate out the damage done and the extent of the
17 damage done by the potential overheating from what they
18 speculate was the injury that occurred before.

19 MR. HUTTENLOCHER: It very well may be very difficult
20 to do that, and Cedar hasn't offered any proof on its damages
21 with respect to that, and we would say that that is improper
22 evidence of mitigation in that regard.

23 THE COURT: Improper evidence of mitigation?

24 MR. HUTTENLOCHER: Yes. There was some other -- if
25 there was --

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1 THE COURT: It's not really a mitigation point because
2 they didn't know about it because it was too late to mitigate
3 in that way.

4 MR. HUTTENLOCHER: That's a fair point, your Honor.
5 There would be some -- and Mr. East acknowledged that it could
6 have been, and it's not only just acknowledgment of a theory,
7 but that the heating records themselves did show there was
8 overheating while it was on the Bow Flora, and there was
9 violations of the heating instructions with the fluctuations
10 and temperatures by over one degree Celsius in shorter than a
11 24-hour period.

12 THE COURT: Right. They show fluctuations. We don't
13 know what happens when it first came onboard. They're all
14 under 60, but there are some that peak over 55.

15 MR. HUTTENLOCHER: That's correct, your Honor. Let me
16 move on to the other points.

17 So, Cedar's main theory of damages here is the
18 diminution of value claim, which is essentially a cover damages
19 theory. If your Honor finds liability against Dongbu, then we
20 would submit that that would be the only damages that they
21 would be entitled to.

22 Cedar tries to put some additional damages pieces on
23 top of that. Let me just address them shortly.

24 First is Ertisa's lost profits. I just want to point
25 out for your Honor and for the record that Mr. Irisarri, the

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1 only evidence of lost profits was in his declaration paragraph
2 23 where he stated what he thought Ertisa's lost profits would
3 have been. That was stricken from the record. There is no
4 other evidence of lost profits for Ertisa that would be able to
5 support a damages award in that regard.

6 With respect to the two good will claims, both Cedar's
7 loss of good will and Ertisa's loss of good will, again, there
8 is no credible evidence from some sort of appraisal of the loss
9 of good will from an accountant that could provide some sort of
10 good will, and the figures that Cedar selects are, in essence,
11 plucked from thin air. There is no basis for the number that
12 they had reached with respect to their two good will numbers.

13 Finally, just to address the interest claim that Cedar
14 has put forth an argument that the 9 percent New York State
15 statutory rate applies. We would submit that that is
16 incorrect, and that the federal rate should apply, and this
17 exact issue has actually been addressed by a Northern District
18 case in 1994. It's *Delchi Carrier v. Rotorex Corp.*, 1994 U.S.
19 Dist. LEXIS 12820.

20 It was the same type of issue. You've got a CISG case
21 that there was prejudgment interest that was awarded by that,
22 and the Court in that case said the entitlement to prejudgment
23 interest falls under Article 74 of the CISG, Article 74 of the
24 CISG, being a multinational treaty to which the United States
25 is a party, then the prejudgment interest rate would be the

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1 federal rate and not the state rate.

2 THE COURT: All right.

3 MR. HUTTENLOCHER: With that, your Honor, I conclude.

4 Thank you.

5 THE COURT: Thank you.

6 MR. LILLIS: Good noon day, your Honor. We thank
7 everyone for the opportunity this week to have had this case
8 heard on behalf of Cedar and all the support we've had and all
9 the cooperation we've had from counsel, etc.

10 We suggest that the preponderance of the evidence
11 shows that when you look at Exhibit 80 and you look at 3, 5 and
12 C, it shows that there was injury or damage pre-Bow Flora. The
13 control number is D. Indeed, if D had been found to be off
14 specification in the shore tank, Dongbu would have been liable
15 as well because it was before risk of loss passed.

16 Instead, what D shows, and Mr. Minton testified to, is
17 the cargo as manufactured by Kumho, and nominated by Dongbu to
18 fill that contract, was manufactured fine. It was on
19 specification. So I would suggest, your Honor, that sample D
20 gives us a baseline as a base data point.

21 Mr. Minton, I think correctly, suggested that you have
22 to look at all the evidence. We can't just cherry-pick one
23 here or we can't just grab one there. We have to look at all
24 the evidence. All the evidence shows --

25 THE COURT: Mr. Lillis, let me ask a couple questions.

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1 MR. LILLIS: Go ahead, Judge.

2 THE COURT: First question: For you to prevail, do I
3 have to be persuaded of the seeding theory?

4 MR. LILLIS: I don't think so.

5 THE COURT: Is there anything in the record that
6 suggests that the contemporaneous samples were not accurate
7 measures of the cargo at the time they were taken; that is to
8 say, the May 20 test?

9 MR. LILLIS: No, I'm sure they were correct at that
10 time.

11 THE COURT: So what are the possibilities then of
12 understanding why, if it was tested on May 20, the first foot
13 on the Bow Flora showed a hazen unit of 4 and after loading
14 showed a hazen unit of 4, what are the possible explanations
15 then of how the future off specification could be attributed to
16 what happened before the Bow Flora?

17 MR. LILLIS: OK, I'm sorry. I would say partly yes --
18 I wasn't looking at the top line. You're correct on that.

19 THE COURT: I worried about that; that you haven't
20 been looking at the top line. It's an important line, isn't
21 it?

22 MR. LILLIS: Well, it was a line that my client paid
23 \$2 million for the cargo.

24 THE COURT: Is it a line that your experts have
25 accounted for?

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1 MR. LILLIS: Well, they accounted for it in the
2 seeding.

3 THE COURT: OK. So back to my first question.

4 MR. LILLIS: That's fair. That's fair. They've
5 accounted for it in the seeding, is that it was injured pre-Bow
6 Flora, and they looked at those three samples, the retained
7 samples 3, 5 and C.

8 THE COURT: So, for you to prevail, I have to be
9 persuaded of your expert's seeding theory.

10 MR. LILLIS: Yes.

11 THE COURT: Thank you.

12 MR. LILLIS: Let me just get a couple other things out
13 of the way for a moment, your Honor.

14 THE COURT: Can I ask -- maybe this is where you were
15 going.

16 MR. LILLIS: Please.

17 THE COURT: Another sort of framing question. Your
18 brothers for the defendants say that even if I am persuaded by
19 a preponderance of the evidence that the phenol was injured
20 before it passed the rail of the Bow Flora, that they can still
21 prevail because of the express language in the contract
22 requiring as a final measure of specification to be the
23 contemporaneous testing.

24 MR. LILLIS: Well, it's not the contemporaneous
25 testing. The final surveys turned out to be all of them. They

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1 were all of them -- all of the inspectors dealt with that.

2 THE COURT: So take on, if you would -- persuade me
3 that if I conclude, and in light of the contract language, how
4 is it that -- persuade me that if I conclude that some injury
5 occurred before the Bow Flora, that they have to be liable in
6 light of the contract language, in light of the fact that it
7 tested on spec on May 20.

8 MR. LILLIS: Can I have my colleague cover that point?

9 THE COURT: Sure.

10 MR. LILLIS: Should we do that right now? OK.

11 MR. WILLIAMS: Your Honor, the answer to your question
12 is based on an actual reading of the contract language.

13 THE COURT: Always a good place to start.

14 MR. WILLIAMS: Always a good place to start. The
15 contract provides that the inspection will be by mutually --

16 THE COURT: Slow down for the court reporter when
17 you're reading, but also let me get the language in front of me
18 while you're reading: It's probably an exhibit.

19 MR. WILLIAMS: It is Exhibit 5, your Honor.

20 MR. LILLIS: It's Exhibit 5.

21 MR. WILLIAMS: The first page, inspection clause,
22 about three-quarters of the way down.

23 "The inspection will be by mutually acceptable
24 independent surveyors whose findings as to quality, quantity as
25 per shore tank figures at load port are final and binding on

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1 both parties." This is an agreement that the figures relating
2 to the temperature and ullage and quantity of the shore tank
3 will be final and binding. Just the load port shore tank. No
4 other testing.

5 THE COURT: So tell me what then that means.

6 MR. WILLIAMS: That means that sample -- the
7 contemporaneous line, the first sample drawn less than five,
8 that is final and binding on the parties. That is the only
9 sample drawn from the load port shore tank. That result, and
10 only that result, is final and binding per this clause.

11 This argument was actually addressed. It was made by
12 Dongbu during our summary judgment motion, and it was resolved
13 by Judge Swain in her opinion, which is Docket No. 118.

14 THE COURT: I've got it. You say she resolves it?

15 MR. WILLIAMS: I think she does, your Honor.

16 THE COURT: Point me to the language.

17 MR. WILLIAMS: I will. It is on page 8 of 12.

18 "Dongbu also vaguely intimates that the inspection
19 clause clearly extinguishes any liability under Article 36, but
20 it offers no explanation as to how. The inspection clause only
21 mentions the tests conducted on the phenol in the shore tank,
22 the first of many tests conducted over the course of delivery.
23 Dongbu nonetheless appears to construe this clause to mean that
24 it fulfilled its contractual obligation concerning the phenol's
25 quality when the independent surveyors drew samples from the

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1 shore tanks and certified that it was on specification. This
2 construction would render the FOB term and the elaborate,
3 mutually agreed-upon inspection regime a nullity."

4 Then later in the paragraph she explains that because
5 "There is no surer way to find out what the parties meant, than
6 to see what they have done, and the parties' conduct here
7 clearly demonstrates that they did not intend the inspection
8 term to operate as Dongbu suggests."

9 THE COURT: So where in the contract do you think --
10 or maybe you don't, but where would it lay out the terms for
11 how to determine on specification?

12 MR. WILLIAMS: Well, there is a secondary inspection
13 clause in the terms and conditions on the following page, your
14 Honor.

15 THE COURT: Yes. Paragraph?

16 MR. WILLIAMS: Paragraph seven. The paragraph reads:
17 "The goods need not be inspected by the buyer or its
18 representative upon delivery, but inspection may be made by
19 buyer's customer within one month after buyer acquires physical
20 possession of the goods or clearance by customer of the goods,
21 whichever is later."

22 So, there is a secondary inspection clause. "This
23 mutually independent surveyor selection clause has no bearing
24 whatsoever on this matter. It limits any party's ability to
25 challenge the results of the load port shore tank sample, but

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1 that does not mean that the contemporaneous line of samples
2 drawn has any import on this case whatsoever. Under the CISG,
3 a seller of cargo has an obligation to deliver goods that are
4 in accordance with the contract fit for their ordinary purpose,
5 fit for any intended purpose made known to the seller at the
6 time of the contracting, and in accordance with any
7 specification provided by the seller."

8 So the question then becomes, I guess, how do you
9 evaluate those things in the context of this case? Cedar has
10 proposed that this has to be understood within the context of
11 the usage of this trade. And the subjective intent of Cedar
12 and usage is governed by Article 9 of CISG, and Article 8 of
13 CISG mandates that the court consider the subjective intent of
14 the parties. Dongbu has replied that we have a merger clause,
15 an alleged merger clause, because this is the entire agreement
16 on the parties.

17 If the entire agreement of the parties language
18 applies, then we spent that you could grant us a judgment as we
19 speak. The contract face sets Kumho specifications. Kumho
20 provided Cho Yong, Cedar's agent, its specifications in April
21 of 2005. Those specifications are Exhibit 3.

22 Kumho's specifications call for a color of 5, not 10.
23 So, if Kumho's specifications govern -- if the alleged merger
24 clause limits the Court's consideration of all the evidence to
25 the four corners of that document and any document incorporated

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1 by reference; namely, Kumho's specifications, you could look at
2 Sample D, and the question is over, because it's 10 and it
3 should be 5.

4 THE COURT: But you would still have to persuade me
5 that it's that testing that matters as opposed to the
6 contemporaneous testing.

7 MR. WILLIAMS: And I can do that in this way: Like
8 Judge Swain said, there is no truer Way of determining the
9 parties' intent than by determining what they did. So let's
10 look at the merger clause first. We have a merger clause
11 entered into -- I'll back up a second.

12 Cedar starts negotiating with Kumho in April of 2005.
13 Cho Yong explained that. At some point, Kumho decides to
14 appoint Dongbu as an export agent. This is in the declaration
15 of Mr. Chu that was put forward by Dongbu. There is a meeting
16 between Mr. Cho representing Cedar, Mr. Chu representing
17 Dongbu, and some representative of Kumho. They orally agree on
18 price, quantity, quality, delivery and payment terms at a
19 dinner.

20 A couple of days later, Cedar sends the contracts that
21 we looked at prior, the May 17 contracts that memorializes the
22 oral contract. That has the full agreement of the parties'
23 language.

24 A couple days later, Cedar decides that they want to
25 resell this product to Ertisa. They inform Kumho of this

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1 intent and provide Ertisa's specifications.

2 Now, up until this point Cedar has relied on the
3 specification of phenol in tab 3, which is evidenced by its
4 letter of credit application, which is at Exhibit 6. That
5 letter of credit application incorporates Kumho's
6 specifications calling for a color of 5. That letter of credit
7 application is provided to Dongbu, and they accept it in an
8 email on May 18. So up until that point, the parties agree
9 Kumho specifications calling for a color of 5 applied.

10 In the interim, Cedar decides I want to sell this to
11 Ertisa. As Mr. Harfouche explained, he wanted to do a
12 back-to-back transaction, so he wanted to buy on Ertisa's
13 specs. so he could sell on Ertisa's specs, the assumption being
14 that product when purchased is going to be delivered in the
15 same condition as when it's delivered ultimately to the
16 subsequent customer.

17 So, Cedar informs Dongbu of this. They provide Ertisa
18 specifications. Thereafter, Cedar incorporates Ertisa's
19 specifications into the letter of credit, and Dongbu
20 incorporates them into its commercial invoice.

21 So, we submit that that is a modification of the
22 contract after the fact of the entire agreement language being
23 tendered back and forth between the parties. We don't
24 understand how Mr. Huttenlocher can have it one way but not the
25 other way. If the color has changed and the parties agree to a

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1 modification of the contract, then by definition, the terms of
2 the May 17 agreement can't be the entire agreement of the
3 parties because the entire agreement of the parties includes
4 this modification.

5 So, there was no intent that that clause, the entire
6 agreement language, functioned as a merger clause excluding all
7 other evidence of intent or usage in the trade. Certainly not
8 intent.

9 As for usage in the trade, again, Judge Swain has
10 already resolved the issue. She held in the opinion, again
11 Docket No. 118. "Even if Dongbu showed that the parties
12 intended the merger clause to exclude Article 8 and that Cedar
13 informed Dongbu of its intent to resell the phenol prior to the
14 contract memorialization, Cedar could still introduce evidence
15 of petrochemical trade practices to bolster the inference that
16 Dongbu knew, or should have known, that the phenol would be
17 unfit for ordinary usage if it degraded prior to reaching its
18 final destination."

19 So, Judge Swain has already cited usage and custom and
20 practice in the industry is relevant here. It contextualizes
21 the entire conversation we've been having.

22 THE COURT: All right. I understand the points. We
23 will go back to Mr. Lillis, because you still do have to show
24 where the injury occurred.

25 MR. WILLIAMS: If I can just run through one more

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1 minute.

2 THE COURT: Sure.

3 MR. WILLIAMS: The issue then becomes you have to
4 consider usage. Basically, we submit you have to consider the
5 usage of the trade and the intent of Cedar in determining what
6 happened here. So the question is: Did this phenol comport
7 with the contract? The contract called for pure phenol. Pure,
8 by definition, means homogenous, free of extraneous material,
9 and we submit that sample C shows that on separate instances
10 this material was not pure, insofar it was not entirely phenol.
11 There was some suspect material, sediment or a particulate
12 matter in sample C. That alone shows this wasn't pure phenol.

13 THE COURT: Well, unless there was something wrong
14 with the sample. By that, I mean that the sample got
15 contaminated in a way that didn't reflect the state of cargo at
16 that time.

17 MR. WILLIAMS: Well, you have to understand, as John
18 Minton explained, you take an empty bottle -- actually Mr. East
19 and Mr. Minton explained -- you rinse it, and then you descend
20 it -- it descends through the sample and is pulled back up.

21 Whatever came into that bottle was in the belly of the
22 beast. It was inside the Green Pioneer. This idea that there
23 was some sort of rag or particulate matter already in the
24 bottle is nonsense. The parties had stipulated that the SGS
25 surveyor who pulled these samples, sample C, this particular

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1 sample only uses clean sample bottle.

2 MR. WEINER: I'm sorry. That is not what his practice
3 is.

4 MR. WILLIAMS: Excuse me.

5 THE COURT: It's not your turn, Mr. Weiner.

6 MR. WEINER: I'm sorry, your Honor.

7 MR. WILLIAMS: Paragraph 43, the parties stipulated
8 that SGS Korea's Mr. Yong pulled sample C. His practice is to
9 use new, clean sampling bottles when sampling petrochemical
10 cargoes.

11 So, we submit that that sample illustrates that this
12 was not pure phenol.

13 As far as the intended use and its ordinary use, I
14 don't think there is any debate about the need for phenol to
15 remain practically colorless, below 10, for its intended
16 purpose. This arrived at over 500.

17 As for its intended purpose, because Cedar explained
18 to Dongbu, who must have explained to -- or explained to Kumho
19 who must have explained to Dongbu because Dongbu ultimately
20 agrees, they started uses Ertisa specifications. So they must
21 have known this was going to be a sale that was going to be
22 negotiated to Ertisa; and because it arrived at 500, those
23 didn't comport to Ertisa's specifications.

24 Last, as Mr. Lillis has explained, they ultimately
25 didn't comport with the replacement specifications of color 10.

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1 THE COURT: Thank you.

2 Mr. Lillis.

3 MR. LILLIS: We appreciate this opportunity to be able
4 to have this dialogue with the Court.

5 Exhibit 59 is the letter that Mr. Weiner referred to
6 earlier. We have heard a lot about Mr. East didn't do this and
7 Mr. East didn't do that. First of all, what Mr. East didn't do
8 is he didn't go forward with a causation study. He wanted to
9 do a causation study. And the underwriter said, "No, we're not
10 going to pay for that. We don't want to do that." But he had
11 reported to Mr. Sparrow in August that as far as he was
12 concerned, based upon the Rotterdam results and based upon the
13 Ulsan results, the second line and the bottom line, that as far
14 as he was concerned, it was injured pre-Bow Flora. Indeed,
15 Ertisa accepted that. And that was against Ertisa's interest
16 because the underwriters basically declined the case.

17 The same for Cedar. The underwriter said, "We're not
18 paying it because we were not on the risk at that time." So,
19 sure, do scientists like to do more tests to find out
20 causation? Yes.

21 All of this about phenol being -- an off-color on
22 phenol being not well understood. That's dealing with
23 causation in terms of the fact. The fact is it was off color.
24 And phenol does not go off color every day. True. Millions of
25 tons a year are shipped of phenol around the world and they

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1 don't go off color. Millions of tons a year are shipped around
2 the world with samples in ships' lockers that do not go off
3 color.

4 Mr. Minton testified that if that sample D had been
5 put onboard the Bow Flora, he estimates it would have outturned
6 in Rotterdam at maybe a 5. And we're back to the seeding,
7 Judge, and you're right, all of those samples starting to
8 the -- with Bow Flora going across were in the ship's locker,
9 and we contend they were already damaged.

10 Coming back to Exhibit 59. 59 is important because
11 Cedar told Dongbu right away that there was a problem, and
12 right away Dongbu came back and declined liability. However,
13 Dongbu did participate in the Ulsan testing. That's Exhibit
14 64.

15 Exhibit 64 is interesting because a lot of folks
16 signed that. Kumho signed it, the manufacturer at page 2.
17 Dongbu signed it. Minton signed it. The shipowner for Bow
18 Flora signed it. There was no, what we would call in our
19 business, there were no exceptions. There were no notes or
20 footnotes saying "we disagree with this" or "we disagree with
21 that" or "we disagree with the next thing."

22 I think what's more important in terms of rebuttal to
23 some of counsel's suggestions that more testing could have been
24 done, Dongbu also could have done more testing if they wanted
25 to. I think there was a suggestion today, I'm not sure, that

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1 GSI, Dongbu's own inspectors and surveyors had other samples.
2 Well, if they were confused or if they wanted to defend
3 themselves or they wanted to clarify all the things that were
4 put on Mr. East, Dongbu could have done that as well.

5 The other thing with Exhibit 64, the Ulsan report, and
6 Mr. Harfouche of Cedar testified that as far as he's concerned,
7 sample A was not on specification because it was off-hue.

8 THE COURT: Under that theory, sample D is not on
9 specification, right?

10 MR. LILLIS: It's supposed to be clear. That's fair,
11 Judge.

12 THE COURT: Tell me if this is wrong. Your experts
13 have concluded that there wasn't a problem in the shore tanks.

14 MR. LILLIS: That's right. That's right. I think the
15 trader -- and that's fair, the business person does not want to
16 have off-hue product. At the time, it wasn't to be off-hue.
17 They don't want cloudy product. But it was still off color,
18 so, yes, yes. Minton saw sample D off-hue and still concluded
19 it on specification. That's correct, Judge.

20 THE COURT: So should I take your fact witness or your
21 expert witness? They're inconsistent on this point.

22 MR. SKWRAO: Yes, they are, Judge. In most trials,
23 when they go on with -- in most trials that I'm involved with,
24 everything doesn't line up perfectly symmetrically because the
25 evidence is what it is.

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1 THE COURT: So, who are you going to throw overboard
2 here?

3 MR. LILLIS: Well, I think it's, Judge, kind of --

4 THE COURT: Into the phenol tank.

5 MR. LILLIS: I think it's kind of clear versus cloudy.
6 I think it's pretty clear that Mr. Minton is more qualified.

7 THE COURT: OK.

8 MR. LILLIS: Mr. Minton has had 40 years of
9 experience. He'd a leading consultant to the London market on
10 these issues for petrochemicals. If Mr. Minton is OK with
11 sample D, Exhibit 80, then I'm OK with sample D.

12 THE COURT: Right.

13 MR. LILLIS: The other interesting thing, we've
14 endured in good spirit, but we've endured a torrent of
15 criticism of the Minton firm for all kinds of things,
16 regrettably, I haven't had the chance to cross-examine anyone
17 from Dongbu and any scientist who would come in and say,
18 "Minton, you're all wet on the science," so ...

19 In terms of this heating, which is Exhibit 81, which
20 is the famous, or the infamous, temperature records on the Bow
21 Flora, I am going to refer the Court to Plaintiff's Exhibit 23.
22 Plaintiff's Exhibit 23 is the heating clauses for Cedar. Yes,
23 it says the master is to keep the cargo between 50 and 55.
24 And, yes, at one point it got to 55.9. At other times it
25 jumped around a little bit, but paragraph three --

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1 THE COURT: Can I ask you a question that just
2 occurred to me. I probably should have asked it of the expert.
3 Obviously, the first foot is important. We test separately for
4 it.

5 MR. LILLIS: Yes.

6 THE COURT: At least it's been proffered that we test
7 separately for it because of the possibility of scalding, which
8 makes some intuitive sense, and yet we don't have that
9 temperature. Isn't that surprising?

10 MR. LILLIS: No.

11 THE COURT: Elaborate.

12 MR. LILLIS: As was explained, we're dealing with a
13 tank that's about the size of this courtroom, Judge. We are
14 talking about the Bow Flora right now?

15 THE COURT: Yes.

16 MR. LILLIS: OK. I have evidence on that. I don't
17 have it on the Green Pioneer. There are coils down in the
18 bottom of the tank on the floor here where water goes through
19 it. Then once it's loaded, they'll heat up the hot water, and
20 that's how they'll heat the tank. The chief mate has testified
21 that they did not turn on the heat in the Bow Flora until after
22 all the cargo is loaded. That is unrebutted testimony. That's
23 their standard practice. She was very clear about that.
24 That's in the transcript. That's Exhibit 93.

25 We have that in our proposed findings of fact, Judge.

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1 THE COURT: So her testimony is that in the tank --

2 MR. LILLIS: In the coils.

3 THE COURT: So in the --

4 MR. LILLIS: The pipes.

5 THE COURT: Right. I'm sorry. Let me find my word.

6 What do you call the container on the Bow Flora that holds the
7 phenol?

8 MR. LILLIS: That is the tank.

9 THE COURT: The tank, OK.

10 MR. LILLIS: This is tank 13.

11 THE COURT: So there is no heating applied to the tank
12 until --

13 MR. LILLIS: After all the cargo has been loaded into
14 tank 13 center.

15 THE COURT: And that's testimony in Exhibit 93?

16 MR. LILLIS: 93, chief mate Nilsen. I asked her
17 explicitly about this, Judge.

18 Now, the way the heating is applied, it's applied
19 through pipes in the bottom, or the floor. There is no way
20 someone can physically go down and take that manually because
21 this is toxic chemical. This chemical, phenol, you can only
22 handle it either in refinery or on a ship, in a full suit.

23 THE COURT: I understand. I get the point. Let me
24 ask a question. What does the evidence show as to why the
25 first foot is tested for color?

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1 MR. LILLIS: In the normal practice?

2 THE COURT: Yes.

3 MR. LILLIS: The normal practice, the first foot is
4 tested on all petrochemical shipments and all petrol product
5 shipments.

6 THE COURT: Why?

7 MR. LILLIS: In order to see if there is potential
8 contamination at that time.

9 THE COURT: Why wouldn't they just test it before
10 loading and after full loading?

11 MR. LILLIS: Because if there is a problem in the
12 line, and it shows up right away, you don't damage the whole --
13 you don't damage 2,000 tons. You only may damage --

14 THE COURT: Is there any evidence in the record as to
15 why the first foot is tested? I mean, what you just said makes
16 intuitive sense. There's been a suggestion -- and I don't know
17 what the evidentiary point is -- but the suggestion has been
18 it's tested because of the scalding possibility.

19 MR. LILLIS: Well, it's tested across all -- I don't
20 know if I asked the chief mate or the master about it. It's
21 tested across the board on all petrochemicals to try and see if
22 there is a problem.

23 THE COURT: I might ask them, but for the moment I
24 will ask you: Is there evidence in the record to support the
25 notion that the first foot is tested because of the possibility

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1 of scalding?

2 MR. LILLIS: I don't know that, Judge.

3 THE COURT: OK.

4 MR. LILLIS: I just know in all of our shipments,
5 either on petrochemicals or jet fuel or gasoline, anything that
6 is a refined product, it's always tested on the first foot. So
7 it's not just phenol.

8 THE COURT: It sounds, if I'm right, that the
9 testimony of the chief mate that you're pointing to would, as
10 an evidentiary matter, refute the possibility that the phenol
11 was scalded when it got loaded into the tank. Is that your
12 point?

13 MR. LILLIS: My point is -- well, you asked me a more
14 generic question. You're asking me a generic question, and
15 then you're asking me a specific question. I gave you my
16 general answer.

17 The specific answer, Judge, is the chief mate on the
18 Bow Flora's specific answer on the specific piece of evidence
19 in the record here is Exhibit 93.

20 THE COURT: Right.

21 MR. LILLIS: Which I will cite in the proposed
22 findings of fact.

23 THE COURT: I'm just looking for the testimony. Go
24 ahead. What paragraph?

25 MR. LILLIS: The Exhibit? I mean, the deposition?

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1 I'm going to have to look at the transcript, Judge.

2 THE COURT: Go ahead. You're telling me that.

3 MR. WEINER: Your Honor, there is testimony in the
4 record on scalding.

5 MR. LILLIS: I'm at page 43, Judge.

6 THE COURT: Just a second. She says, "The coils are
7 filled with water but heating doesn't start before we're
8 completed."

9 MR. LILLIS: That's correct. Page 43/line 10 and 11
10 of Exhibit 93.

11 THE COURT: Do you think that testimony as an
12 evidentiary point refutes the contention that the phenol could
13 have been scalded upon hitting the tank?

14 MR. LILLIS: In the Bow Flora?

15 THE COURT: In the Bow Flora.

16 MR. LILLIS: Absolutely. Absolutely. There is also
17 in the pretrial order the stipulation -- I'm sorry, in Martin
18 East, which is Exhibit 85 --

19 THE COURT: Yes.

20 MR. LILLIS: -- at paragraph 18, there is just a
21 general comment on first foot samples.

22 THE COURT: But as you stand here, you're not aware of
23 evidence that explains why the first foot is tested. You've
24 offered an intuitive explanation, I grant you that. But is
25 there anything in the record to support that?

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1 MR. LILLIS: I'm not sure. We may have it in the
2 record, Judge. I don't have it right this second.

3 THE COURT: OK. While you're looking, Mr. Weiner,
4 against my better judgment, just a second, and I will give you
5 full time, Mr. Lillis, but since you're looking...

6 MR. LILLIS: I got 18 and 19 of East, I think, answers
7 it.

8 THE COURT: OK.

9 MR. LILLIS: Of Exhibit 85.

10 THE COURT: Hang on. 18 and 19. I'm going to look at
11 that in one second.

12 Mr. Weiner, briefly.

13 MR. WEINER: 125/line 7 to 12.

14 THE COURT: Says what?

15 MR. WEINER: It says: "Would you agree with me that
16 the first foot is important because sometimes cargo can get
17 scalded as it is first loaded on to a ship. Is that right?
18 "A. That's correct.

19 "Q. That's one of the reasons you take a first foot, right?

20 "A. That's one of the reasons you take a first foot, right."

21 MR. WILLIAMS: I don't have that.

22 MR. WEINER: He's on cross-examination.

23 THE COURT: Gentlemen, this is why it's against my
24 better judgment. Everybody sit down except Mr. Lillis. Only
25 Mr. Lillis talks. Go ahead, Mr. Lillis.

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1 MR. LILLIS: What do I have, Judge, another five?

2 THE COURT: I'm sorry.

3 MR. LILLIS: What do I have, another five minutes
4 maybe? I know you have a 1:00.

5 THE COURT: I do. I will tell you in a second. You
6 have 10 minutes.

7 MR. WILLIAMS: Judge, do you mind if I address one
8 point that I think will help assist the Court in understanding
9 whether or not Article 36(1) is applicable in light of
10 Mr. Huttenlocher's argument?

11 Mr. Huttenlocher tried to parse 36(1) from 36(2), and
12 I'm afraid he fails to do so well. Article 36(1) provides
13 that: "The seller is liable in accordance with the contract in
14 this convention for any lack of conformity which exists at the
15 time when risk passes to the buyer even though the lack of
16 conformity becomes apparent only at a time thereafter."

17 And Ralph Folsom has explained in his text
18 *International Business Transactions in a Nutshell* that: "Any
19 defect that exists at the time risk of loss passes is actual
20 even if discovered later; thus, the buyer is still able to
21 recover for any non-conformity which becomes apparent long
22 after delivery, but the buyer may have to prove that the defect
23 was present at delivery. The buyer need not prove what caused
24 the goods to be defective, only that they are, in fact,
25 defective.

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1 Therefore, all this talk about whether not we've
2 proven the actual cause of the loss is unnecessary. We don't
3 have to show what happened. We have to show by when it
4 happened.

5 THE COURT: Your position is you have met your burden
6 if you have established that there was damage to the cargo
7 before the Bow Flora.

8 MR. WILLIAMS: Right. And we think that Judge Swain's
9 opinion supports that fact.

10 There is another passage from Sylvain Bollee in his
11 text, *The Theory of Risks in the 1980 Vienna Sale of Goods*
12 *Convention* at page 278. It's printed in 1999.

13 This is all available on the CISG's website where he
14 explains that: "What becomes apparent in the situation under
15 Article 36 is a defect which already affected the goods to a
16 full extent at the time of the passing of risk. Although this
17 discovery requires further examination or the development of a
18 condition which existed in an embrionic form at the time is an
19 actionable breach of contract."

20 Now, Mr. Huttenlocher tried to suggest that 36(1)
21 suggests that goods are -- the seller can be liable for goods
22 ad infinitum. That is wholly not the case.

23 If you look at Article 38 and 39, Article 38 requires
24 that: "A buyer examine the goods or cause them to be examined
25 within a short a period as is practical under the

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1 circumstances."

2 39(1) provides that: "The buyer loses the right to
3 rely on a lack of conformity of the goods if he does not give
4 notice to the seller specifying the nature of the lack of
5 conformity within a reasonable time after he's discovered it or
6 ought to have discovered it."

7 As Mr. Lillis explained, as soon as Cedar learned of
8 the defect of the massively off specification condition, we
9 notified Dongbu the same day we learned that fact. So they
10 received notice in a timely manner. They inspected it. And a
11 second time as soon as possible under the circumstances.

12 All of this comports with the normal trade practice in
13 this industry. Goods are loaded aboard a vessel. They're
14 tested at a point in time to make sure they are on
15 specification at that time. Samples are retained over the
16 course of delivery to ensure that there is no inherent defect
17 that exists that may later show up upon delivery. That's
18 precisely what happened here.

19 MR. LILLIS: Five minutes, Judge?

20 THE COURT: Let me get a time check. Yes, five.

21 MR. LILLIS: Thanks, Judge.

22 Indeed the international scheme in terms of how all of
23 the traders operate, how all the companies operate in these
24 areas, they all have retained samples. Everyone does retained
25 samples, and, fortunately, 99.99 percent of the time there is

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1 no problem. Cargo is delivered whatever it is -- phenol, jet
2 fuel, benzene, gasoline. It is delivered without incident, and
3 it moves on to customer or manufacturer, and it's used and
4 that's it.

5 When you have a situation like this where a cargo
6 shows up off specification sometime during the supply chain,
7 that's the reason retained samples are taken. That is the
8 reason that there is an SGS, the reason there is a GSI, and
9 that was testified to by both of the commercial people over the
10 last couple of days. Indeed, that's how the market operates.

11 My brother, Michael, commented on damages. He is
12 correct. Ertisa withdrew its lost profits claim yesterday,
13 paragraph 23. Ertisa has their claim for diminution of value
14 and expenses. The total of that is Exhibit 77. And then their
15 packet in support of that is Exhibit 76. All of that has been
16 established really without any cross-examination or any
17 effective dispute on that.

18 THE COURT: May I ask, the other damages point made, I
19 think goes to the suggestion that, again, even if I conclude
20 that something happened prior to the Bow Flora, what have you
21 shown to establish that whatever did occur prior to the Bow
22 Flora is responsible for the extent of the damage to the
23 phenol?

24 MR. LILLIS: Talking about the argument that there was
25 an aggravation of the damage on the Bow Flora?

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1 THE COURT: Yes.

2 MR. LILLIS: Is that the question?

3 THE COURT: Yes.

4 MR. LILLIS: Number one, we contend --

5 THE COURT: Or somewhere after Cedar takes
6 responsibility.

7 MR. LILLIS: Well, it would have been -- the Bow Flora
8 was the only -- the Bow Flora is the only conveyance, Judge.

9 THE COURT: I was thinking along the lines between the
10 Bow Flora and the Rotterdam shore tanks, but it's at over 500
11 before that, so ...

12 MR. LILLIS: When Bow Flora came into Rotterdam, they
13 tested it when it was still in the tanks in the Bow Flora, and
14 it was over 500. So the question is if Bow Flora aggravated
15 the damage, how do you deal with that?

16 THE COURT: Right.

17 MR. LILLIS: I think, number one, they did not
18 aggravate the damage. Mr. Minton has opined that the handling
19 was within appropriate limits. The Cedar heating instructions,
20 while they say 55, they also say 60 is when there would be
21 color damage.

22 THE COURT: But there is certainly testimony that the
23 range should be 50 to 55 as handling instructions, and that a
24 certain level of constancy of temperature should be maintained,
25 and, in particular, there is a document that talks about no

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1 greater fluctuation than a degree over a 24 hour period.

2 MR. LILLIS: These are all goals, Judge, and we are
3 also dealing in the real world here. We are dealing with a
4 tank that is as big as this room. So this is not a perfect
5 science or a perfect situation. This is an attempt to try and
6 regulate temperature as best you can. But with a bulk that is
7 as big as this room with coils that are only in the bottom, you
8 are not going to be approaching perfection.

9 In fact, here, I would suggest, that perfection would
10 get in the way of good. The practice is this is a modern ship.
11 These were modern officers, well-trained, and these temperature
12 records were comfort -- we're comfortable with these
13 temperature records. That's the reason we reopened and had the
14 big fight about temperature records and wound up taking the
15 captain and wound up taking the chief officer.

16 The other thing is that we didn't know there was any
17 kind of a problem until we got to Rotterdam and there would be
18 no way to segregate it anyway.

19 So if you injure a cargo prior to delivery and it's
20 going onboard a vessel, those are the foreseeable and direct
21 consequences that flow from there.

22 THE COURT: Respond to the point, if you put some
23 weight on the August Ulsan test, then we know that it went from
24 10 to over 500. Obviously, you've offered your seeding theory
25 to explain how this gets worse over time, but that would also

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1 suggest, I think, quite the possibility that even if there was
2 a problem, it somehow exacerbated, given that it's so wildly
3 off specification at the end, and given that -- well -- given
4 that and given what we know about the temperature controls.

5 MR. LILLIS: I suggest to you, your Honor, that the
6 temperature controls were within reasonable, practical,
7 reality. That is my suggestion.

8 In terms of -- I mean, John Minton testified if --
9 let's assume you're doing about 55 degrees Celsius in terms of
10 heating the cargo. If it's predamaged, that's going to
11 accelerate it.

12 THE COURT: Right. But that suggests that that
13 subsequent event can exacerbate an existing problem.

14 MR. LILLIS: It can, but it is also foreseeable. You
15 are sitting here, you are loading a cargo which turns out to be
16 off specification onto a vessel that is going on a voyage. I
17 would suggest that the Bow Flora handling was within normal
18 proper limits.

19 THE COURT: Since it's your burden, it seems to me --
20 we obviously are putting a great deal of weight on the factual
21 determination whether you have established that something
22 happened to this cargo before the Bow Flora, but your proof has
23 to be that the injury at the end of the road in Rotterdam is
24 attributable to what happened before the Bow Flora.

25 MR. LILLIS: And foreseeable consequences flowing

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1 therefrom.

2 THE COURT: But you don't know -- but how do I answer
3 what the natural foreseeable consequences are of an injury that
4 your experts can't say what it was or when it was?

5 MR. LILLIS: Well, the injury, we know, is before Bow
6 Flora.

7 THE COURT: That is what we are assuming for the
8 moment, yes.

9 MR. LILLIS: Right. That's my contention, right.

10 THE COURT: So let me ask this: Let's focus on sample
11 C, since obviously that's extraordinarily important for you.

12 MR. LILLIS: Yes, it is.

13 THE COURT: I think what we know is that there is a
14 contamination in the phenol, the stuff, which presumably
15 explains -- well, I think from your perspective explains why
16 we've got a -- you tell me, it explains why we have a 30 to 50,
17 because of the matted substance?

18 MR. LILLIS: No, not necessarily.

19 THE COURT: But maybe?

20 MR. LILLIS: The matted substance is there, but not
21 necessarily.

22 THE COURT: Well let me ask this: Let's say it's the
23 matted substance that's the contamination -- and I'm not
24 talking about a contamination of the sample. I'm talking about
25 a contamination of the cargo. Let's say it's a matted

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1 substance.

2 MR. LILLIS: Yes.

3 THE COURT: Is there any proof that that matted
4 substance could lead, by the time you get to Rotterdam, to a
5 hazen unit of over 500?

6 MR. LILLIS: No. No. I don't have that evidence.

7 THE COURT: I think your experts testify it's either a
8 contamination or --

9 MR. LILLIS: Or heat.

10 THE COURT: -- or temperature.

11 MR. LILLIS: Correct.

12 THE COURT: Is there testimony that the temperature
13 that the phenol is exposed to between the load port shore tanks
14 and the Bow Flora could lead to, by the time you get to
15 Rotterdam, a hazen unit of over 500?

16 MR. LILLIS: Where are you starting, Judge?

17 THE COURT: Is there any evidence that -- basically,
18 the point I am getting to is, let's say -- just take this as a
19 premise.

20 MR. LILLIS: We're talking hypothetically, Judge.

21 THE COURT: That you've established that something
22 happened before the Bow Flora.

23 MR. LILLIS: Right.

24 THE COURT: Don't you still need to establish that
25 whatever it is that happened could lead to, could cause, by the

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1 time it gets to Rotterdam, a measurement of greater than 500
2 hazen?

3 MR. LILLIS: John Minton testified to that. He
4 absolutely testified to that.

5 THE COURT: But he doesn't know what caused it. So
6 something caused it, is what he told me.

7 MR. LILLIS: But you don't need to know what caused it
8 in order to know that if it was this injured it could wind up
9 having a greater than 500, because ultimately that is the
10 reality.

11 THE COURT: All right. 30 seconds to wrap it.

12 MR. LILLIS: In conclusion, your Honor, as far as
13 Cedar is concerned, Cedar bought cargo. It turned out to be
14 off spec. We say the evidence shows that it was pre-Bow Flora.

15 I thought you were going to ask me about loss of good
16 will. My brother, Michael, is correct that we have no forensic
17 accountants to deal with loss of good will. I think both of
18 the commercial people testified for your Honor about loss of
19 good will, and that is just an estimate that if the Court --

20 THE COURT: Am I supposed to put a dollar number on
21 that?

22 MR. LILLIS: It would be within your discretion.

23 THE COURT: And what evidence would I look to in the
24 record?

25 MR. LILLIS: There is no evidence -- there is clearly

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1 loss of good will, but there has been no demonstration of a
2 dollar amount.

3 THE COURT: So any dollar amount I attributed would be
4 speculation?

5 MR. LILLIS: It's reputational damage, Judge.

6 THE COURT: So, if I say that the reputational damage
7 here is worth a dollar, is that OK?

8 MR. LILLIS: It would be within your sound discretion,
9 Judge.

10 THE COURT: And if I said the reputational damage here
11 is a million dollars, that's within my sound discretion?

12 MR. LILLIS: I would say not. I would say not.

13 THE COURT: So --

14 MR. LILLIS: If we're talking about a million two
15 euros in terms of actual hard damages.

16 THE COURT: All right. I've got the point, and you've
17 got the point. I'm going to be late for my meeting. Just give
18 me one moment. I just want to gather my thoughts on what
19 exactly I'm going to ask you to do for briefing and when
20 because I have a notion, and I want to jot it out. Give me a
21 second.

22 (Recess)

23 THE COURT: At base what I want are final proposed
24 findings of fact and conclusions of law that are keyed to the
25 trial record as it now exists. I want that to really be

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1 streamlined to what I need. So I am going to put you on a 25
2 page limit. I want that by Wednesday. The thing that I was
3 trying to formulate, and I am, frankly, still not able to quite
4 articulate in my mind exactly what the question is. We are
5 getting at it, but it is the point of dispute as to the
6 contract and the terms and the interplay with CISG.

7 I am trying to articulate it in a way that really kind
8 of gets to what matters as a decisional point. I don't know if
9 anyone has a suggestion for the question. I come to the
10 question in the following way, which I've asked, which is: If
11 I conclude that the evidence shows damage prior to the Bow
12 Flora, does that mean that Dongbu is liable? And
13 Mr. Huttenlocher's answer to that is no. And Mr. Lillis' and
14 Mr. Williams' answer to that is yes. And I think the
15 difference between you two has to do with various points of
16 contract interpretation and interplay with CISG.

17 MR. LILLIS: Right.

18 THE COURT: Would you both agree with that?

19 MR. WEINER: I agree with that, your Honor, yes.

20 THE COURT: So let me try this: My proposal would
21 also be to get like 10 pages of briefing on the question.

22 MR. LILLIS: That's what I was going to suggest.

23 THE COURT: So, separate and apart, do your proposed
24 findings of fact and conclusions of law, but give me 10 pages
25 of briefing on the question of just assume that it's been

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1 established that some damage to the product occurred prior to
2 the Bow Flora, is there an argument that Dongbu is not liable.

3 MR. LILLIS: And that includes the CISG discussion.

4 THE COURT: Yes. I have tried to think of a way to
5 formulate the question that gets at that, but every time I
6 think about a formulation of that question, I can't find how it
7 intersects exactly with how it matters here. That is, it seems
8 to me, again, premised on the hypothetical which obviously is
9 the main point in dispute; but there is this other argument
10 that is present which may be decisional if I conclude that
11 plaintiff has met its burden on that factual point.

12 If I conclude that plaintiff has not met its burden on
13 that factual point, obviously, none of this matters.

14 So my suggestion -- and I might try to fine-tune it
15 and put out an order rephrasing the question, but as I sit here
16 now, in addition to your 25 pages of proposed findings of fact
17 and conclusions of law, I want a 10 page brief on the question
18 of whether if plaintiff has established damage to the phenol
19 prior to the Bow Flora, can Dongbu escape liability.

20 And I don't mean to interweave in that damages
21 questions. I just mean to focus on the contract and the
22 interplay with CISG.

23 Mr. Lillis.

24 MR. LILLIS: I was having the same thought that you
25 were having while you were having it. I'm sorry, Judge.

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1 THE COURT: I know you well enough to believe you even
2 though it's funny. Go ahead.

3 MR. LILLIS: It is. But as I was having that thought,
4 my counsel, Mr. Williams, handed me the pretrial order and
5 referenced me to paragraph three --

6 THE COURT: Yes. Yes. Yes.

7 MR. LILLIS: -- of the issues agreed to be decided.

8 THE COURT: Go ahead, read it.

9 MR. LILLIS: It basically says 3: "Did Cedar prove by
10 a preponderance of the evidence that the injury to the phenol
11 occurred before the phenol passed the rail of the Bow Flora?
12 If yes, then Cedar has established Dongbu's liability (Dongbu
13 reserves all its rights regarding damages). If not, Cedar's
14 claims against Dongbu are dismissed."

15 THE COURT: Interesting. I will take a look at that,
16 but I still want briefing on the question. You are arguing, in
17 effect, that they have waived the argument. That is
18 inconsistent with their proposed findings, but I will -- is
19 that the argument?

20 MR. WILLIAMS: This was a negotiated agreement between
21 counsel, and these are the three legal issues to be decided.
22 The first two are what is the entire agreement language and was
23 there a modification of the contract, and how does that
24 interplay on the Court's interpretation of the alleged merger
25 clause.

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1 THE COURT: OK.

2 MR. WILLIAMS: I would propose we could brief those
3 issues. I think those issues are discrete and they leave the
4 third issue in tact which is established. The parties have
5 agreed.

6 THE COURT: Well, the problem is -- and this is the
7 problem with my ability to get at this question, which is that
8 I think that's the wrong order, at least for me. Everybody
9 agrees plaintiff has to establish that the damage occurred
10 prior to the Bow Flora.

11 MR. LILLIS: Yes.

12 THE COURT: But there are these separate arguments
13 made, which are, I think, embedded in the earlier questions in
14 the stip, what does the contract require and what is the
15 interplay with CISG. And what they contend is even if conclude
16 that they have established -- you get the point. I want
17 briefing on that.

18 MR. WEINER: Just so I'm clear, the word "injury" to
19 me is different from the word "damage." "Injury" here is a
20 liability issue. "Damage" obviously is a calculation of harm.

21 THE COURT: I don't mean damage. So, to be clear, the
22 question is: If we assume that plaintiff has established that
23 the phenol was injured prior to the Bow Flora, is Dongbu
24 liable?

25 MR. WEINER: Yes. Then there's the next issue which

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1 is: Did that cause the damage, the causation issue.

2 THE COURT: Yes, I do understand that. Tell me, that
3 is a damages question, a causation question, that I think is
4 separate and apart from the contract terms and the interplay of
5 the contract with CISG.

6 MR. WEINER: That's correct, but that is not something
7 I think the parties had previously focused on. We now have the
8 testimony regarding blending and the ability to bring phenol
9 back to spec., and, as your Honor raised in some of your
10 questions, there was a question about what caused the 500,
11 which that's the damage. So I was wondering if you want that
12 addressed as well.

13 THE COURT: You're right, it is a separate question,
14 and it has a legal and factual component. So I will take
15 briefing on it. Again, it is assuming the same premise.

16 Mr. Williams, I know what you are going to say; that
17 they've waived that too. I'm not sure that's right, but you
18 can include in the briefing the waiver question and -- let me
19 finish. So, for purposes of our briefing, we are going to
20 assume -- and this is obviously --

21 MR. LILLIS: Hypothetical.

22 THE COURT: -- the determinative question I have to
23 reach. We are going to assume plaintiff has established that
24 the phenol was injured prior to the Bow Flora. Question one:
25 Is Dongbu liable? Question two: If Dongbu is liable, has

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1 plaintiff established damages?

2 MR. WILLIAMS: Your Honor, may we touch on interest on
3 that point? We obviously have different points of view as to
4 what rate applies.

5 THE COURT: You can touch on interest, sure. I think
6 all of those points including interest would be welcome to have
7 actual briefing.

8 On the core question of whether or not the phenol was
9 injured prior to the Bow Flora, there I want proposed findings
10 and conclusions.

11 MR. LILLIS: Absolutely, your Honor.

12 MR. WILLIAMS: I don't know how we're going to do this
13 in 10 pages, to be frank.

14 MR. WEINER: I was going to say the same thing.

15 THE COURT: OK, 15.

16 MR. LILLIS: In fairness, Judge, I'm not going to be
17 writing the brief. However, in fairness, you have put a lot
18 on--

19 THE COURT: It's grown, I admit that.

20 MR. WILLIAMS: You've put a lot on Mr. Williams and
21 Mr. Huttenlocher to do this in 15 pages.

22 THE COURT: You can have 20 pages.

23 MR. LILLIS: Thank you, your Honor.

24 THE COURT: But, look --

25 MR. WILLIAMS: Less is more.

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1 THE COURT: -- less is more, I assure you am.

2 As you can see, I try to figure out the core
3 decisional points. I understand the context. I don't need any
4 of that in terms of the factual issues. I know 80 better than
5 Mr. Lillis, for example, so get to the core of what I need to
6 decide.

7 MR. LILLIS: On 80, I will do proposed findings.
8 That's all. I am not doing any briefing. You want conclusions
9 of law on that also?

10 MR. WEINER: Yes.

11 THE COURT: There aren't many, but you have to
12 conclude. You have to apply the findings to a conclusion.

13 MR. LILLIS: OK.

14 THE COURT: I agree there's not a lot of law there,
15 but it's for the analysis point.

16 MR. LILLIS: OK.

17 MR. WEINER: One other point, your Honor, I had
18 mentioned to you I'm beginning trial Tuesday, which means
19 between now and Monday I'm preparing for that.
20 Mr. Huttenlocher has now the burden of the findings of fact and
21 the brief, and Wednesday seems a little bit tough for him.
22 Could we have to that Friday that I mentioned now that we threw
23 in a 20 page brief?

24 THE COURT: I'm sorry, I can't. For my schedule, I
25 need it next week.

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1 MR. WEINER: OK.

2 THE COURT: Given the number of -- you're not solo
3 practitioners. You have resources. Mr. Huttenlocher is, I'm
4 sure, up to handling the task.

5 MR. HUTTENLOCHER: I am, your Honor.

6 THE COURT: Gentlemen, thank you. I do very much
7 appreciate your working together to resolve issues at the end
8 here. There could have been more of that in the years past
9 maybe, but I do appreciate that, and I appreciate your
10 diligence and zealousness in presentation of your sides.

11 I'll come shake hands. Thank you. We're adjourned.

12 (Trial adjourned)